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No. 96-1788

In The

Supreme Court of the United States

October Term, 1996

CITIZENS UNITED,

Petitioner,

v.

UNITED STATES OF AMERICA, WILLIAM JEFFERSON CLINTON, JAMES McDOUGAL, JIM GUY TUCKER, SUSAN McDOUGAL, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, and DOW JONES COMPANY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR THE PRESIDENT OF THE UNITED STATES IN HIS PERSONAL CAPACITY

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in declining to permit the public to duplicate the videotaped deposition of President Clinton after playing the videotape in a courtroom full to capacity, releasing the transcript of the deposition testimony, and offering to replay the videotape for persons unable to view the videotape at the trial.

2. Whether the First Amendment compels a trial court to permit duplication of videotaped trial testimony even though neither the public nor the press has ever had physical access to the videotape.

PARTIES TO THE PROCEEDINGS BELOW

During the course of the proceedings, President Clinton has appeared, through separate counsel, in his official capacity and in his personal capacity. Although named in the caption as Respondents, James McDougal, Jim Guy Tucker, Susan McDougal and Dow Jones Company, Inc., took no part in the appeal to the Court of Appeals for the Eighth Circuit.

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OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is reported at 103 F.3d 651 (8th Cir. 1996); the August 12, 1996, order of the Court of Appeals (Pet. App. 20a), which preceded issuance of the opinion, is reported at 92 F.3d 701 (8th Cir. 1996). The opinion and order of the United States District Court for the Eastern District of Arkansas (Pet. App. 24a) are reported at 940 F. Supp. 224 (E.D. Ark. 1996). The order denying Citizens United's suggestion for rehearing en banc and denying its petition for rehearing by the panel (Pet. App. 35a) is unreported.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Rule 53 of the Federal Rules of Criminal Procedure provides:

> The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted.

Local Rule F-5 of the United States District Court for the Eastern and Western Districts of Arkansas provides:

> PHOTOGRAPHING, BROADCASTING, TELEVISING, AND RECORDING IN COURTROOM AND ENVIRONS
>
> (a) The taking of photographs, the recording by any means other than the official court reporter or the radio or television broadcasting (or making of audio or video tapes) in any courtroom or its environs, utilized by either United States District Court in Arkansas during the progress or in connection with any judicial proceedings, including proceedings before a United States Magistrate Judge, is PROHIBITED, except as hereinafter provided, and regardless whether such hearing or proceeding takes place on public or private property or in the office or chambers of a judge or magistrate judge or otherwise.
>
> (b) The taking of photographs, still or motion pictures, and audio and video tapes, of ceremonies and interviews, including administration of oaths of applicants for citizenship and to executive and judicial officers, may be permitted with leave of the Court or the officer in charge thereof; provided that the ceremonies and interviews are not connected with any judicial proceedings. "Judicial proceedings" as used herein, shall include all judicial proceedings, whether civil or criminal, and whether pending, on appeal, or terminated.
>
> (c) "Environs", as used in this Rule, shall include the part of any federal building

with the District set apart for the United States District Court and its facilities, including chambers of the Court, other facilities of court officials and adjacent hallways.

(d) Exception for Media Representatives to make Audio Tapes. Duly identified and authorized representatives of the print, radio, and television media may unobtrusively make audiotapes during trials and hearings in open court solely for the purpose of assuring the accuracy of reports. The only official record of such proceedings shall continue to be that made by the official court reporter and the Clerk in accordance with law. Proper prior arrangements for the making of such audiotape recordings shall be made where necessary to avoid any interruption or interference with such proceedings. Audiotape recordings made pursuant to this exception may not be broadcast or rebroadcast to the public, transferred or sold, or used as such for commercial purposes.

STATEMENT OF THE CASE

The President of the United States, in his personal capacity, adopts and incorporates herein by reference the statement of facts set forth in the Brief in Opposition for the President of the United States in his Official Capacity.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Overview

Citizens United's request for review is both factually unfounded and legally unjustified. Petitioner frames its "central Constitutional issue" as whether "the public can be forever denied access" to the President's videotaped deposition testimony." (Pet. 12). Yet this is *not* a case in which the public has been "forever denied access." The public was permitted to attend the entire criminal trial, where "the videotape was played in open court, to a courtroom full to capacity." (Pet. App. 28a-29a). The district court made transcripts of the testimony "available to the public immediately and a number of newspapers printed the deposition in its entirety." (Pet. App. 29a). Moreover, the district court has an offer outstanding to replay the videotape for "members of the public who were unable to view the videotape at the trial." (Pet. App. 5a n.5). In short, the factual premise for Citizens United's petition – the alleged denial of access – is wholly absent.

Even if the factual predicate *were* present, the legal basis is nonexistent. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-10 (1978), this Court addressed and rejected the constitutional claim that Citizens United seeks to relitigate here. Further review is unwarranted.

One other irrefutable fact further underscores the inappropriateness of this case for review here: while Citizens United contends that the lower courts' decisions herald an inter-circuit conflict over the status of a videotape deposition as a "judicial record," both courts below assumed *arguendo* that the videotape *was* a "judicial record" subject to the common-law right of public access. (Pet. App. 14a, and 31a). The district court then employed

the well-established balancing analysis recognized by this Court in *Nixon*, 435 U.S. at 599, for resolving issues of access to judicial records. The court of appeals found no abuse of discretion. (Pet. App. 15a-17a). Thus, while Citizens United might wish to quibble with the *result* of the district court's exercise of discretion, since the outcome below did not turn on whether the videotape is or is not a "judicial record," the alleged "conflict" presents no issue deserving of this Court's review.[1]

II. Under *Nixon*, It Is Settled That Petitioner Had No First Amendment Right To Duplicate The Videotape.

Citizens United argues that review is necessary to vindicate "important First Amendment principles protecting speech and political debate." (Pet. 12). Petitioner asserts that the rulings below "effectively undercut this Court's established and profound commitment to uninhibited, robust, and wide-open debate on important political and public policy matters." (Pet. 14).

But this Court resolved this issue in *Nixon*. There, various media organizations had sought permission to duplicate and broadcast portions of audiotapes of politically charged White House conversations by defendants

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[1] As Justice Stevens pointed out in his dissenting opinion in *Nixon*, "The question whether a trial judge has properly exercised his discretion in releasing copies of trial exhibits arises infrequently. It is essentially a question to be answered by reference to the circumstances of a particular case. Only an egregious abuse of discretion should merit reversal; and when the District Court and the Court of Appeals have concurred, the burden of justifying review by this Court should be virtually insurmountable." 435 U.S. at 613-15 (Stevens, J., dissenting) (footnotes omitted).

and others that had been introduced in evidence at the trial of President Nixon's advisors. 435 U.S. at 594. This Court *rejected* the argument that, insofar as the tapes had been played in open court and made exhibits,[2] the press possessed a constitutional right to copy and publish them. *Id.* at 609.[3] In undertaking its First Amendment analysis, the Court drew a critical distinction between tapes to which the public has already been given physical access and those "to which the public has never had *physical* access." *Id.* Because written transcripts were made available to the public and because the "contents of the tapes were given wide publicity by all elements of the media," the Court held that the press had "no right to information about a trial superior to that of the general public," *id.* at 609, and therefore had no First Amendment right to duplicate the tapes.[4]

This holding is precisely applicable to Citizens United's claims. Citizens United has never claimed to possess a First Amendment "right to information about a trial superior to that of the general public" *or* the press.

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[2] In *Nixon*, the tapes were not only played for the jury; they were also actually entered into evidence. 435 U.S. at 594. In this case, although the transcript of the deposition was admitted into evidence, the videotape itself was not admitted. (Pet. App. 12a).

[3] *See also* 435 U.S. at 608 ("Respondents argue that release of the tapes is required by both the First Amendment guarantee of freedom of the press and the Sixth Amendment guarantee of a public trial. Neither supports respondents' conclusion.").

[4] This Court in *Nixon* likewise rejected any suggestion that the Sixth Amendment guarantee of a public trial somehow requires that any part of a trial "be broadcast live or on tape to the public." 435 U.S. at 610.

Nor has it ever suggested that the public has ever had *physical* access to the videotape that Citizens United seeks to duplicate. Consequently, its "central Constitutional issue" is not worthy of further review.

III. Since The Lower Courts' Rulings Assumed Arguendo That The Videotape Was A Judicial Record, There Is No "Conflict" To Be Resolved.

Citizens United argues alternatively that review is necessary to resolve a conflict among the federal circuits. It contends that the court below strayed from the rulings of other circuits in holding that a videotape deposition is not a "judicial record." (Pet. 14). But neither the district court nor the court of appeals based its holding solely on a determination that the videotape was not a "judicial record." For example, the district court specifically avoided the issue, stating:

> The Court need not decide at this time whether the common law right of access applies to videotaped testimony because even assuming it does, the Court finds, on balancing all the relevant factors, that the press' request to copy the videotape must be denied.

(Pet. App. 31a). The district court then articulated at length how it weighed the relevant factors "in light of the relevant facts and circumstances," *see Nixon*, 435 U.S. at 599, of this case. (Pet. 31a-33a).

Similarly, while the Eighth Circuit concluded that *this* videotape was not a "judicial record," its decision did not rest upon the conclusion that *no* videotape could ever be deemed to be a judicial record. More importantly, for purposes of deciding *this* case, the court of appeals

"assume[d] that the videotape is a judicial record subject to the common-law right of public access. . . . " (Pet. App. 14a). The Eighth Circuit heeded this Court's admonition in *Nixon* that "the decision as to access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." (Pet. App. 15a) (*quoting Nixon*, 435 U.S. at 599). After carefully reviewing the district court's findings and analysis and considering the arguments advanced by petitioner and the other appellants, the Eighth Circuit found no abuse of discretion and, in fact, observed that the record revealed additional compelling considerations justifying the district court's decision to bar duplication of the videotape. (Pet. App. 16a-17a). In short, the decision below did not rest on the ruling alleged to present a conflict within the circuits.

Citizens United also contends (Pet. 16-17) that the Eighth Circuit's opinion conflicts with decisions of other circuits over the strength of the presumption favoring access. These cases are plainly distinguishable because each involved questions of access once the tapes themselves had been admitted into evidence.[5] In this case, the President's testimony was played, but the videotape itself was never admitted into evidence and therefore did not become a part of the record. More importantly, with one

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[5] *See United States v. Guzzino*, 766 F.2d 302, 303 (7th Cir. 1985); *In re National Broadcasting Co., Inc.*, 653 F.2d 609, 610 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 816 (3d Cir. 1981); *Application of National Broadcasting Co. (Myers)*, 635 F.2d 945, 948-49 (2d Cir. 1980); *Application of CBS (Salerno)*, 828 F.2d 958, 960 (2d Cir. 1987); *United States v. Martin*, 746 F.2d 964, 966 (3d Cir. 1984).

exception,[6] each of the cases relied upon involved access to substantive evidence – tapes that captured the primary conduct of the parties or witnesses – rather than mere testimony.[7] Finally, unlike the decisions below none of the cases upon which Petitioner relies gave the necessary weight to the federal and local rules prohibiting the recording and rebroadcasting of court testimony. See Fed. R. Crim. P. 53 and Local Rule F-5. (Pet. App. 32a, 13a and *supra* pp. 1-2). These distinctions, standing alone, make this case a poor candidate for sorting out any perceived inter-circuit conflict.

IV. Neither Court Based Its Decision On The Potential Political Use Of The Videotape.

As Citizens United frames the issue, the "overriding reason for denying access to the videotape in this case was speculation that the President's political opponents

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[6] That case, *Application of CBS (Salerno)*, 828 F.2d 958, 960 (2d Cir. 1987), is distinguishable because the actual tape was admitted into evidence. The court's rationale for permitting duplication rested largely on the notion that the videotape might more accurately convey the witnesses' testimony. This is a factor that the Court specifically considered but found insufficient in *Nixon*. 435 U.S. at 601 & 602.

[7] *See Guzzino*, 766 F.2d at 303 (audiotapes of telephone conversations involving defendant); *Martin*, 746 F.2d at 966 (audiotapes of face-to-face and telephone conversations involving defendant); *In re National Broadcasting Co., Inc.*, 653 F.2d at 611 (videotapes and audiotapes of conversations involving defendants); *Criden*, 648 F.2d at 303 (audiotapes of telephone conversations involving defendant); *Application of National Broadcasting Co., Inc.*, 635 F.2d at 947 (audio and videotapes involving defendant accepting bribes).

would 'misuse' the videotape." (Pet. 20). The opinions say nothing of the kind. First, if *any* of the district court's reasons could be construed as "overriding" it was that "substantial access" – a factor specifically sanctioned in *Nixon*, 435 U.S. at 600 n.11 – had already been given to the public. (Pet. App. 31a). Second, while the last factor the district court cited was "the potential for misuse," (Pet. App. 32a-33a) it weighed four other considerations against what it acknowledged as the public's "strong interest" in duplicating the videotape.[8] The clear tenor of the district court's concern over "misuse" focused on the evils of marketing, another factor that this Court had specifically legitimized in *Nixon*. *See id.* (*quoting* 435 U.S. at 601). Likewise, nothing in the Eighth Circuit's opinion

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[8] The court first noted that "substantial access" had already been accorded the public. (Pet. App. 31a). Second, the district court found no justification to treat the President's videotaped testimony differently from that of other testimony, particularly in light of Rule 53 of the Federal Rules of Criminal Procedure and the district court's own "Local Rule F-5" which "would have prohibited photographing any of the testimony." (Pet. App. 32a). The district court also noted that releasing the videotape for duplication not only "would contravene the Court's concern with accommodating the interests of the Presidency and might impede any future attempts" to obtain a President's testimony, but would also be inconsistent with the manner in which the videotaped depositions of Presidents Ford and Carter had been handled in other cases. (Pet. App. 32a and n.9). Finally, the district court considered the criminal defendants' argument that release of the videotape could negatively impact them in any future trial, but ultimately gave this consideration little weight. (Pet. App. 33a n.10).

suggests that it considered whether the "President's political opponents" might use the videotape.[9]

V. Petitioner Lacks A Procedural Or Substantive Basis To Claim An Entitlement To Attend The Videotaping Of The Deposition.

Citizens United also argues (Pet. 22) that review would be appropriate "to resolve confusion" over whether the public had a right to attend the actual filming of the deposition. This argument fails both for procedural and substantive reasons. Procedurally, Citizens United should not be heard to complain about the public's exclusion from the actual videotaping because it did not move the District Court for authorization to attend the deposition, much less obtain a ruling from the District Court on that issue.[10] Thus, any argument about the public's right to attend the deposition has been waived.

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[9] While concern for the political misuse of a videotape might provide a legitimate consideration, *see, e.g., Inhofe v. Wiseman*, 772 P.2d 389 (Okla. 1989), the text of the district court and appellate court opinions below provides no basis for inferring that either court was motivated by such a consideration. Indeed, the *only* mention of political misuse appears in the court of appeals' recapitulation of arguments *Citizens United* made in its brief. (Pet. App. 9a-10a). Thus, the "evil" petitioner alleges in part IIC of its petition lacks any basis in fact in the record below, and any review of that issue should await a case in which the issue is actually extant.

[10] Citizens United first entered the case on May 13, 1996, (Pet. 5, 45a), which was roughly two weeks after the deposition was taken, (Pet. 4) and four days after the videotape had been played in open court. (Pet. 4, 27a).

As a substantive matter, the argument is equally flawed. Depositions historically have not been open to the general public. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 396-97 (1979) (Burger, C.J., concurring). And where, as here, a deposition is taken for subsequent use at trial, opening the deposition to the public creates numerous problems, such as endangering the ability of a defendant to receive a fair trial, *see id.*, at 378 (majority opinion), and preventing the court from effectively sequestering witnesses. *See* Fed. R. Evid 615. In any event, the public's right to view and hear witness testimony was completely vindicate by the playing of the videotape at trial and the dissemination of the transcript immediately thereafter.[11] *See Nixon*, 435 U.S. at 609 and Pet. App. 28a-29a.

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[11] Although Citizens United argues (Pet. 22) that merely making the transcript available does not satisfy the public right to attend proceedings, that was not the extent of the public's access in this case. The public *was* permitted to attend the trial wherein the tape was played, and the district court has offered to replay the tape for members of the public who wish to view it. (Pet. App. 5a n.5). If the "problem" is that members of the public wish to see the videotape, the "solution" should be to let them see it, as the district court has clearly offered to do. *Id.* Mandating that the district court treat the President's testimony, or any Rule 15 deposition unlike any other testimony presented in its courtroom would force the district court to violate the principles in its own rule prohibiting taping and broadcast of trial testimony. See Local Rule F-5 and Fed. R. Crim. P. 53. It would also contradict the principles confirmed in *Nixon* that "every court has supervisory power over its own records and files." 435 U.S. at 598, and that "the decision as to access is best left to the sound discretion of the trial court. . . . " *Id.* at 599.

VI. No Compelling Reason Exists To Address Petitioner's Standing Argument.

Finally, petitioner claims (Pet. 24-25) that certiorari should be granted in order to establish the principle that it had standing to seek access to the videotape. Because the court below permitted Citizens United to participate and considered Citizens United's substantive arguments, *see* Pet. App. 8a n.9 and 19a, no basis exists for addressing the standing issue at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted:

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